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No. 94-1143

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT H. CHANDLER, II, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the civil forfeiture of petitioner's 33-acre farm on the ground that the farm was improved with proceeds of drug offenses and facilitated those offenses constituted an excessive fine under the Eighth Amendment.

2. Whether it violated due process to require petitioner to bear the burden of proof on his defense to forfeiture once the government established that there was probable cause for forfeiture of the property.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 36 F.3d 358.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1994. The petition for a writ of certiorari was filed on December 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of North Carolina, a 33-acre farm claimed by petitioner was civilly forfeited to the United States under 21 U.S.C. 881(a)(6) and (7). The court of appeals affirmed. Pet. App. 1a-19a.

1. The United States commenced this in rem action against Tract 1 of Little River Farms in Orange County, North Carolina, alleging that the property was "proceeds" traceable to exchanges of controlled substances, that it had been used to facilitate drug offenses, and that therefore it was forfeitable under 21 U.S.C. 881(a)(6) and (7). The 33-acre property, valued at approximately $569,000, was owned solely by petitioner, who inherited it from his mother in 1978. Petitioner intervened in the action to contest the forfeiture. He disputed the factual allegations of the complaint, and claimed in the alternative that he had had no knowledge of any drug activities on the property. Pet. App. 2a-3a.

At trial, government witnesses John Baucom, Doug Frazee, and Gary George testified that they had distributed, packaged, sold, purchased, and used controlled substances, including marijuana, cocaine, and quaaludes, on Little River Farms. Baucom, who worked for petitioner at the farm, testified that he was paid in marijuana and cocaine by petitioner for doing maintenance work on the property, such as cutting grass, landscaping, and minor carpentry jobs. He testified that on approximately 30 or 40 occasions, petitioner paid him $100 and a half-gram of cocaine in the basement of the farmhouse. Baucom also testified that he observed petitioner in the basement with one

or two pounds of marijuana, and that he saw other persons, including George, pick up marijuana from petitioner on at least three occasions. Baucom also testified that he was at times instructed by petitioner to serve as a lookout while petitioner and George consummated drug deals on the farm. Pet. App. 3a.

Frazee testified that he did maintenance work on the farm in 1985 and 1986, and that on at least a dozen occasions petitioner paid him for his work with cocaine. He usually received the drugs in the kitchen of the farmhouse. In addition, Frazee testified that on at least 15 occasions between 1984 and 1987, petitioner sold him cocaine in quantities ranging from a quarter of a gram to an ounce. Pet. App. 3a-4a.

Finally, George testified that in 1987 petitioner distributed to him two bales of marijuana in the garage of the farm. Each bale weighed 30 or 40 pounds, and together the two bales were worth between $30,000 and $48,000. George testified that he noticed that there were two or three more bales of marijuana stored inside the trunk of a car in the garage. George also testified that he observed Chris Nash, one of petitioner's employees, burning marijuana wrappers on the farm. Pet. App. 4a.

2. At the close of the government's case, the court found that probable cause had been established by the government and that the burden had shifted to petitioner to show, by a preponderance of the evidence, that the property was not used in the commission of drug offenses or that he did not know about the illegal use. Petitioner called several witnesses who worked on the farm. They testified that they never observed petitioner with any drugs on the property. Petitioner testified that he had not engaged in any illegal activities on the farm. Pet. App. 4a.

The jury found that the property had been used to facilitate drug offenses, that it was improved using the proceeds of drug offenses, and that petitioner could not claim lack of knowledge of the illegal activities. The district court entered a decree and judgment forfeiting the farm to the United States. Pet. App. 4a.

3. The court of appeals affirmed. Pet. App. 1a-19a. The court rejected petitioner's claim that the forfeiture of the farm violated the Excessive Fines Clause of the Eighth Amendment. The court noted that, after the jury verdict in this case, *Austin* v. *United States*, 113 S. Ct. 2801 (1993), held that the Excessive Fines Clause applies to civil forfeitures. The court also noted that *Austin* specifically declined to adopt "a test for determining when a forfeiture is constitutionally excessive," leaving that question for further development in the lower courts. Pet. App. 6a.

In order to "discharge the task given [the lower courts] by *Austin* of articulating the standard" of excessiveness (Pet. App. 6a), the court of appeals drew upon Justice Scalia's concurring opinion in *Austin* (113 S. Ct. at 2812-2815), which suggested that the inquiry should focus on how closely tied the property was to the offense, rather than the value of the property as such. Pet. App. 8a. The court accordingly adopted the following method for evaluating whether a civil forfeiture is excessive (*id.* at 10a):

> [I]n determining excessiveness of an *in rem* forfeiture under the Eighth Amendment, * * * a court must apply a three-part instrumentality test that considers (1) the nexus between the offense and the property and the extent of the

> property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder. In measuring the strength and extent of the nexus between the property and the offense, a court may take into account the following factors: (1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time during which the property was illegally used and the spacial extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense.

The court found that "instrumentality test" readily satisfied in this case. *Id.* at 11a-13a.

The court noted that petitioner's farm served as the location for more than 130 drug transactions between 1984 and 1988, and it emphasized that petitioner's drug deals in the house and garage benefitted from the seclusion of the surrounding acreage. For example, the court noted that petitioner installed a security camera near the entrance to the long private road leading to the property and instructed Baucom to keep watch there. Pet. App. 12a. The court also noted that the property was improved with the proceeds of drug transactions, because petitioner used drugs to pay for maintenance work on the farm, and that petitioner was a knowing participant in all aspects of the drug activity on the farm. Finally, because petitioner produced no evidence that the im-

mediate situs of the drug transactions—the house and garage—was separately platted and could be readily separated from the surrounding acreage, and "in light of the ample evidence in support of forfeiture," the court concluded that "the entire 33-acre property, as identified in the warrant for its seizure, may be forfeited."[1]

Relying on its decision in *United States* v. *Santoro*, 866 F.2d 1538, 1544 (1989), the court of appeals also rejected petitioner's claim that it violated due process for him to bear the burden of proof on his affirmative defenses to forfeiture. The court explained that it is "not unconstitutional to shift the burden to the claimant, after the probable cause showing, to prove his entitlement to the property." Pet. App. 14a.

ARGUMENT

1. Petitioner argues (Pet. 16-21) that the court of appeals erred in failing to adopt a "proportionality analysis" under the Excessive Fines Clause, and that its decision conflicts with those of other courts of appeals. That claim warrants no further review.

In *Austin* v. *United States*, 113 S. Ct. 2801 (1993), this Court held that the Excessive Fines Clause applies to civil in rem forfeitures under Section 881, because the protection of the Clause is not limited to criminal proceedings and the civil forfeiture at issue was punitive in effect. 113 S. Ct. at 2806-2812. As the

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[1] Judge Wilkinson, concurring, Pet. App. 15a-19a, argued that a verdict of forfeiture reached in accordance with the prerequisites of Section 881 "would foreclose an Eighth Amendment challenge in all but egregious circumstances." Pet. App. 17a. He concluded that no such egregious circumstances were shown here that would justify overriding the jury's verdict. *Id.* at 19a.

court of appeals recognized, however, *Austin* expressly declined to adopt a test for determining whether a forfeiture is constitutionally "excessive" and left that issue open for development by the lower courts. *Id.* at 2812. The Court stated that it would not "rule out the possibility that the connection between the property and the offense may be relevant" in determining excessiveness, but noted that its decision did not "limit [the lower courts] from considering other factors" that might also be relevant. *Id.* at 2812 n.15. In a concurring opinion, Justice Scalia suggested that the sole measure of an in rem forfeiture's excessiveness is the relationship between the forfeited property and the offense. *Id.* at 2814-2815.

Since *Austin*, the courts of appeals have had few occasions to consider what analysis governs the issue whether an in rem civil forfeiture under Section 881 violates the Excessive Fines Clause. For that reason the issue is not ripe for consideration by this Court. Indeed, the decision below is the only federal appellate decision to pronounce a square holding on the issue. The court of appeals did not, as petitioner contends (Pet. 16-17), adopt the strict "instrumentality test" advocated by Justice Scalia in *Austin*. While the court relied heavily on the relationship between the offense and the property (a factor that the *Austin* majority conceded could be relevant to the excessiveness inquiry), it also gave significant weight to the criminal culpability of the property's owner. Pet. App. 10a.

Two other courts of appeals have expressed dissatisfaction with exclusive reliance on a strict "instrumentality" test for excessiveness as articulated by Justice Scalia's concurrence in *Austin*. See

United States v. *9638 Chicago Heights*, 27 F.3d 327 (8th Cir. 1994); *United States* v. *Premises Known as RR No. 1*, 14 F.3d 864 (3d Cir. 1994). One of those courts has suggested the appropriateness of considering the monetary value of the property in determining whether the forfeiture is excessive. *9638 Chicago Heights*, 27 F.3d at 330-331. In neither case, however, was the court's discussion of the excessiveness issue necessary to its decision. See *id.* at 330 (noting that court's reversal of forfeiture on another ground obviated need to decide whether the forfeiture was excessive under *Austin*); *Premises Known as RR No. 1*, 14 F.3d at 873 (in reversing summary judgment in the government's favor and remanding for trial, the court left the determination of excessiveness to "the district court in the first instance * * *, if its resolution becomes necessary"). Those cases therefore do not conflict with the decision below.[2]

In any event, the forfeiture in this case was not excessive under any analysis. A strict "instrumentality" test would support forfeiture because the

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[2] Petitioner errs in suggesting (Pet. 17) that *United States* v. *Sarbello*, 985 F.2d 716 (3d Cir. 1993), and *United States* v. *Alexander*, 32 F.3d 1231 (8th Cir. 1994), conflict with the decision below. Those cases involved criminal in personam forfeitures, not the type of civil in rem forfeitures at issue in this case. After its decision in this case, the court of appeals made clear that it agrees with, and will follow, the holdings of *Sarbello* and *Alexander* when assessing claims of excessiveness in the context of criminal in personam forfeitures. See *United States* v. *Wild*, No. 93-5630 (4th Cir. Mar. 2, 1995), slip op. 8-9 ("We agree * * * that, because this case involves an *in personam* criminal forfeiture * * *, *Chandler* does not control * * * and the value of the property being forfeited is a factor to be considered").

property was directly and repeatedly used to commit drug offenses and its size and secluded location substantially facilitated the commission of those crimes. As the court of appeals noted (Pet. App. 12a-13a), petitioner's active and knowing involvement in the drug offenses that occurred on the farm, and the commission of those offenses for his benefit further support the conclusion that the forfeiture in this case was not excessive.

A "proportionality" analysis likewise demonstrates that the forfeiture of petitioner's farm was not excessive. Petitioner was involved in the wholesale distribution of narcotics worth hundreds of thousands of dollars. The bales of marijuana observed on the property in 1987 alone were worth $100,000, and the evidence indicated that their presence was but part of a longstanding pattern of drug trafficking on the property. See Pet. App. 4a.[3] Forfeiture of property worth $569,000 is not disproportionate to that conduct.

2. Petitioner also contends (Pet. 21-28) that it is unconstitutional to require a forfeiture claimant to bear the burden of proving affirmative defenses to the forfeiture of the property. That claim does warrant review.

By virtue of 21 U.S.C. 881(d), the provisions of 19 U.S.C. 1615, which govern the burden of proof for customs forfeitures, apply in Section 881 proceedings.

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[3] Contrary to petitioner's apparent assumption, see Pet. 19-21, the statute of limitations applicable to the forfeiture runs from "the time when the alleged offense was discovered," 19 U.S.C. 1621, not from the time when the offense occurred. In any event, as petitioner concedes, Pet. 20, the storage of bales of marijuana on the property in 1987 fell within the five-year limitations period.

Section 1615 provides that, once the government has demonstrated that probable cause exists for forfeiture of the property, a person claiming the property has the burden of proving by a preponderance of the evidence that the property is not subject to forfeiture. All the courts of appeals to consider the question have held that the statute's allocation of the burden of proof is constitutional. See *United States* v. *228 Acres of Land*, 916 F.2d 808, 814 (2d Cir. 1990); *United States* v. *Price*, 914 F.2d 1507, 1512-1513 (D.C. Cir. 1990); *United States* v. *Parcels of Land*, 903 F.2d 36, 49 (1st Cir. 1990); *United States* v. *4492 S. Livonia Road*, 889 F.2d 1258, 1270 (2d Cir. 1989); *United States* v. *Santoro*, 866 F.2d 1538, 1543-1544 (4th Cir. 1989); *United States* v. *D.K.G. Appaloosas, Inc.*, 829 F.2d 532 (5th Cir. 1987), cert. denied, 485 U.S. 976 (1988); *United States* v. *One 1970 Pontiac GTO, 2-Door Hardtop*, 529 F.2d 65, 66 (9th Cir. 1976); *Bramble* v. *Richardson*, 498 F.2d 968, 973 (10th Cir.), cert. denied, 419 U.S. 1069 (1974). Indeed, petitioner does not contend that there is any division of authority on that question.

Petitioner asserts that the forfeiture provisions of Section 881(a)(6) and (7) "are in nature criminal fines" and therefore the government should bear the burden of proving "the case beyond a reasonable doubt or by clear and convincing evidence." Pet. 23. An in rem forfeiture, however, is not by nature a "criminal fine." This Court's reasoning in *Austin* was not that a forfeiture is a criminal fine, but rather that the Excessive Fines Clause applies both to civil and criminal "punishments," and accordingly applies to a punitive forfeiture even though it is *not* a criminal fine. *Austin* specifically declined to address the issue of whether civil forfeiture proceedings are by their

nature criminal proceedings to which criminal-law burden of proof rules apply, 113 S. Ct. at 2806 & n.6, and petitioner has not made the difficult showing necessary to overcome Congress's expressed intention to create a civil forfeiture provision. See *United States* v. *Ward*, 448 U.S. 242, 249 (1980).[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner also argues (Pet. 27-28) that the current allocation of the burden of proof in forfeiture proceedings violates the Bill of Attainder Clause of the Constitution, Art. I, § 9, Cl. 3. That issue was not raised or passed upon below, and thus is not properly before this Court. See *United States* v. *Williams*, 112 S. Ct. 1735, 1738 (1992). In any event, the forfeiture lacks the character of imposing individual punishment necessary to make out a Bill of Attainder claim. *Nixon* v. *Admin. of General Serv.*, 433 U.S. 425, 474 (1977).